

E-Filed 10/30/2006

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

UNITED STATES OF AMERICA and JAY
GOLDENBERG, Estate Tax Attorney,

Petitioners,

v.

DALE C. LANDON,

Respondent.

Case Number C 06-3734 JF (PVT)

ORDER¹ GRANTING IN PART AND
DENYING IN PART PETITION TO
ENFORCE INTERNAL REVENUE
SERVICE SUMMONS

[re: docket no. 1]

Petitioners seek enforcement of an Internal Revenue Service (“IRS”) summons served on Respondent on February 2, 2006. Respondent opposes the petition on the basis that he has provided all information and materials not covered by the attorney-client privilege. For the reasons discussed below, the Court will grant in part and deny in part the petition.

I. BACKGROUND

Petitioners make the following allegations in their reply to Respondent’s response to the

¹ This disposition is not designated for publication and may not be cited.

petition.² Respondent is a co-trustee of the Landon Family Trust (“Trust”) and executor of his decedent father’s (“Decedent”) estate. Respondent and his wife transferred the bulk of his parents’ assets from the Trust to a family limited partnership (“FLP”) with the assistance of attorney D. John Thornton (“Thornton”). Ownership of the FLP was then gifted in highly discounted chunks to Respondent and his brother, Jerry Landon. In this manner, Decedent’s assets were transferred to his children without being subject to federal estate or gift taxation. IRS Estate Tax Attorney Jay Goldenberg (“Goldenberg”) was assigned to examine decedent’s estate tax return and the 2001 and 2002 gift tax returns.³

Petitioners first served a summons on Respondent on December 22, 2005. *See* Reply Ex. A. This summons required Respondent to appear before Kyle Martin, an IRS officer, to answer questions regarding the FLP. The summons also required Respondent to bring associated documents including correspondence, computations, and forecasts to the appearance. Respondent met with Goldenberg pursuant to this summons on February 2, 2006. Respondent allowed himself to be interviewed on that date, but asserted the attorney-client privilege with respect to many questions and requests for documents. *See* Testimony of D. John Thornton, Esq., Reply Ex. B; Dale Landon Interview, Reply Ex. B. Respondent provided no documents on this date.

Petitioners served a revised summons on Respondent on February 2, 2006, requiring Respondent to appear before Goldenberg on February 17, 2006. *See* Reply Ex. C. The revised

² Respondent has not responded to these allegations. The Court expresses no opinion on the merits of Petitioner’s allegations.

³ Petitioners inform the Court that the statutory provision at issue in their examination of the relevant tax returns is 26 U.S.C. §2036(a), which provides that an estate shall include property transferred by the decedent if he retains a life estate interest in the property. This statutory section excepts any property transferred in “a bona fide sale for an adequate and full consideration in money or money’s worth.” 26 U.S.C. §2036(a). The motivation for the summons at issue in the present petition was to determine whether the estate qualifies for this “bona fide sale” exception.

The applicability of this statutory provision and the issue is not before the Court at this time.

1 summons repeated the requirements of the first summons with the exception that it expanded the
 2 scope of its request regarding the family's reasons for forming the FLP. Respondent did not
 3 appear on February 17, 2006. On February 23, 2006, IRS Associate Area Counsel Miles D.
 4 Friedman wrote to Thornton notifying Respondent that local proceedings might be brought if
 5 Respondent did not meet with Goldenberg on March 3, 2006. Respondent did not meet with
 6 Goldenberg on this date.

7 On June 12, 2006, Petitioner filed a petition to enforce the summons. On June 16, 2006,
 8 the Court issued an order that Respondent show cause why he should not be compelled to appear
 9 and provide documents and testimony. The Court heard oral argument on October 13, 2006.
 10 The parties thereafter filed supplemental letter briefs regarding the compulsion of additional
 11 questions not included in the original motion to compel.

12 II. LEGAL STANDARD

13 IRS summonses are "subject to the traditional privileges and limitations, including the
 14 attorney-client privilege." *Segerstrom v. United States*, 2001 WL 283805 (N.D. Cal.) (quoting
 15 *Upjohn Co. v. United States*, 449 U.S. 383, 398 (1991)). The essential elements of the attorney-
 16 client privilege are as follows: (1) Where legal advice of any kind is sought, (2) from a
 17 professional legal adviser in his capacity as such, (3) the communications relating to that
 18 purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected,
 19 (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived. *In re*.
 20 *Fischel*, 557 F.2d 209, 211 (9th Cir. 1977) (citing 8 Wigmore Evidence, § 2292 at 554
 21 (McNaughton rev. 1961)). "The purpose of the privilege is to make clients make full disclosure
 22 to their attorneys." *Fisher v. United States*, 425 U.S. 391, 403 (1976) (citing 8 Wigmore §§
 23 2291, 2306); *see also Gomez v. Vernon*, 255 F.3d 1118, 1131 (9th Cir. 2001) ("Federal common
 24 law recognizes a privilege for communications between client and attorney for the purpose of
 25 obtaining legal advice, provided such communications were intended to be confidential."). To
 26 avoid the implied disclosure of confidential client communications, "the privilege normally
 27 extends both to the substance of the client's communication as well as the attorney's advice in
 28

1 response thereto.” *In re. Fishel*, 557 F.2d at 211. The privilege does not extend beyond the
 2 client’s confidential communications with his or her attorney, and “[a]n attorney’s involvement
 3 in, or recommendation of, a transaction does not place a cloak of secrecy around all the incidents
 4 of such a transaction.” *Id.* at 212. “[T]he cloak of the privilege simply protects the
 5 communication from discovery, the underlying information contained in the communication is
 6 not shielded from discovery.” 979 F.2d 939, 944 (2d Cir. 1992).

7 “The attorney-client privilege . . . does not cover the fact (or not) of whether one sought
 8 legal advice.” *Methode Electronics, Inc. v. Rinisar Corp.*, 205 F.R.D. 552, 556 (N.D. Ca. 2001)
 9 (citing *Gomez*, 255 F.3d at 1131). The attorney-client privilege does not protect communications
 10 such as fee arrangements that do not convey the substance of confidential professional
 11 communications. *Ousterhoudt v. United States*, 722 F.2d 591, 593-94 (9th Cir. 1983). The
 12 amount of a fee is generally not protected by the attorney-client privilege. *Clarke v. America*
 13 *Commerce Bank*, 974 F.2d 127, 129 (9th Cir. 1992). However, “correspondence, bills, ledgers,
 14 statements, and time records which also reveal the motive of the client in seeking representation,
 15 litigation strategy, or the specific nature of the services provided, such as researching particular
 16 areas of law, fall within the [attorney-client] privilege.” *Id.*

17 III. DISCUSSION

18 The parties dispute whether Respondent may decline to answer a series of questions and
 19 requests for documents on the basis of the attorney-client privilege.⁴ The Petitioners do not argue
 20 that the Respondent has waived his attorney-client privilege⁵ or that they should have access to
 21

22 ⁴ Petitioners refer to Respondent’s claim of the attorney-client privilege as to the items
 23 regarding the creation of the FLP (Entry Nos. 48, 54, 55, and 58), as well as to the billing
 24 statements (Entry No. 51). Reply 4. Petitioners argue that Respondent bears the burden of
 25 providing that materials are privileged, but does not argue that Respondent may not assert the
 26 privilege with respect to any parts of entries 48, 51, 54, 55, and 58. Petitioners instead argue that
 the Court should compel Respondent to answer and produce a subset of those questions and
 documents requested in entries 48, 51, 54, 55, and 58.

27 ⁵ Respondent argues that the privilege has not been waived, Response 3-4, but the Court
 28 does not perceive an argument to the contrary in the petition or the reply. Instead, the Petitioners
 only suggest on two occasions that Respondent could waive this right. Reply 5, 7. The Court

1 privileged materials.

2 1. Letter From Thornton to Respondent

3 Respondent asserts that the attorney-client privilege protects a letter faxed by Thornton to
 4 Respondent on February 23, 2000. Response Ex. 2. Respondent asserts that this is the only
 5 correspondence in Thornton's files concerning the formation of the FLP. The Koslowski
 6 Declaration asserts that this letter contains legal advice and that the contents have not been
 7 disclosed to anyone other than Respondent or his attorneys. Petitioners concede that "the letter is
 8 probably privileged based on the description based on the description provided in the Kozlowski
 9 Declaration." Reply 5. Petitioners write that they "do not request enforcement where the
 10 description of the document on its face bears a viable claim of privilege." *Id.* The Court will
 11 therefore deny the petition to the extent that it seeks to compel production of the letter faxed on
 12 February 23, 2000.

13 2. Oral Testimony - Formation of the FLP

14 a. Questions Objected to on the Basis of the Attorney-Client Privilege

15 Petitioners seek to compel Respondent to answer a series of questions which he has
 16 declined to answer on the grounds of the attorney-client privilege. *See* Dale Landon Interview,
 17 Petition Ex. B (questions 16-17, 24-31, 34-45, 48-49, 51-53, 55, 93). Goldenberg posed these
 18 questions to Respondent on February 2, 2006.

19 Question 17:

20 Question 17 asks: "How did the idea of forming the LP come about?" This question
 21 might implicate the confidential communication of Respondent's motivations and reasons for
 22 formation of the FLP to Thornton. For example, Respondent might answer question 17: "The
 23 idea of forming the LP came from confidential-consultation with my attorney." The attorney-

24 _____
 25 therefore will not address this issue.

26 Petitioners also do not argue that Respondent's failure to produce a privilege log
 27 constitutes waiver of the attorney-client privilege. Instead, the Petitioners state that they have
 28 treated the Declaration of Joseph Kowlowski as "functionally equivalent to privilege logs." The
 Court therefore will not consider whether Respondent has waived the attorney-client privilege by
 his failure to produce a privilege log.

client privilege would cover such a response because such information would identify the specific nature of the services Thornton provided to Respondent. *See Clarke* 974 F.2d at 129.

However, the attorney-client privilege would not allow Respondent to decline to answer this question if the idea of forming the FLP arose prior to, or independent of consultation with an attorney. Petitioners should refine this question if they want to gather such information.

Question 29:

Question 29 asks: “Who has personal knowledge of your reasons and motivations for the formation and use of the LP?” Like question 17, question 29 might implicate the confidential communication of Respondent’s motivations and reasons for formation of the FLP to Thornton. For example, Respondent might answer question 29: “My attorney has personal knowledge of my reasons and motivations for the formation of the LP.” The attorney-client privilege allows Respondent to decline to give such a response because it would identify the specific nature of Thornton’s representation of Respondent. *See Clarke*, 974 F.2d at 129.

However, the attorney-client privilege would not allow Respondent to decline to answer question 29 to the extent that it asks whether persons other than his attorney had personal knowledge of his reasons and motivations for the formation of the FLP. Petitioners should refine this question if they want to gather such information.

Question 31:

_____ Question 31 asks: “How many meetings were there with Mr. Thornton or any one from his office to form the LP?” This question would confirm the specific nature of Thornton’s representation of Respondent. The attorney-client privilege allows Respondent to decline to answer this question. *See Clarke*, 974 F.2d at 129.

Questions 30, 41-43:

30. Do you know of any document that corroborates your reasons for the formation of the LP?
- ...
41. Did Mr. Thornton or anyone from his offices send you any letters, emails or other correspondence about the formation of the LP?
42. Did you send Mr. Thornton or anyone from his office any letters, emails or other correspondence about the formation of the LP?
43. Do you have the letters, emails or other correspondence Mr. Thornton or anyone

1 from his office sent you or you sent Mr. Thornton or anyone from his office about
2 the formation of the LP?

3 Questions 41-43 pertain to correspondence between Respondent and Thornton on the
4 subject of the FLP. These questions appear intended to confirm the specific subject matter of
5 Thornton's representation of Respondent. The attorney-client privilege shields the disclosure of
6 the specific nature of the services provided. *See Clarke*, 974 F.2d at 129. Respondent therefore
7 may decline to answer these questions on the basis of the attorney-client privilege.

8 Question 30 appears to cover the same ground as questions 41-43, and Respondent may
9 also decline to answer it on the grounds of attorney-client privilege. This question also would
10 include in its scope any documents outside the representation of Respondent, such as a letter by
11 Respondent to a family member. Petitioners should refine this question if they seek to learn
12 about documents created outside Respondent's confidential attorney-client relationship with
13 Thornton.

14 Question 45:

15 Question 45 asks: "Did you see any calculations or projections of the tax benefits to be
16 achieved by forming the LP?" This question appears to pertain to correspondence between
17 Respondent and Thornton, but does not specifically ask if Respondent received such forecasts
18 from Thornton. This lack of specific reference to Thornton makes this question similar to
19 questions 17 and 29, in that it implicates confidential communications under some
20 circumstances, but not others. Respondent may assert the attorney-client privilege with respect
21 to question 45 to the extent that it implicates forecasts received from counsel, for the same reason
22 that he may with respect to questions 17 and 29.

23 However, the attorney-client privilege does not allow Petitioner to decline to answer
24 questions regarding calculations or projections that were created outside his confidential
25 attorney-client relationship with Thornton. Petitioners should refine this question if they want to
26 know if Respondent received forecasts from other sources than Thornton or prior to the
27 formation of an attorney-client relationship.

28 Question 55:

_____ Respondent stated in his interview that the following statement was not correct: “The ‘Consent to Actions by Partners of Landon Associates L.P. In Lieu of Organization Meeting’ dated January 1, 2000 states that the LP will be funded by the Family Trust’s contribution of all of its assets as of January 1, 2005.” Question 55 asks: “What should it say if it is not correct?” The recorded answer is: “Mr. Thornton directs him not to respond and the reason doesn’t matter.” Respondent’s letter brief includes this question in the list of questions to which he objects on the basis of the attorney-client privilege. The statement which formed the basis for question 55 includes no reference to attorney-client communications. Therefore, Respondent may not refuse to answer question 55 on the basis of the attorney-client privilege.

Remaining Questions (16, 24-28, 34-40, 44, 48-49, 51-53, 93)

16. How did you meet Mr. Thornton?

...

24. Who made the decision to form the LP?

25. Why did you want to form and use the LP?

26. Were your parents aware of the LP?

27. Did they want to form and use it?

28. To what extent was Carol Landon involved in the decision to form and use the LP?

...

34. Were the meetings [with Mr. Thornton] in person?

35. Who was present at each meeting you attended to form the LP?

36. Who was present at each meeting to form the LP that you did not attend?

37. Did you take any notes at any of the meetings attended to form the LP?

38. Did you ask any questions at any of the meetings you attended to form the LP?

39. Do you know if your parents attended any meetings with Mr. Thornton?

40. Did decedent ask any questions at the meetings you attended to form the LP?

...

44. Did Mr. Thornton or anyone from his office send decedent any letters, emails or other correspondence about the formation of the LP?

...

48. Were any of the terms of the LP agreement negotiated among the partners/members?

49. By negotiations, I am referring to the following:

a. Decision as to whom would be a partner/member.

b. Decision as to whom would be a general partner/managing member.

c. Decision as to whom would be a limited partner.

d. Responsibilities of a general partner/managing member.

e. The extent of each partner’s/member’s ownership interest in the LP.

f. When distributions could be made.

g. Circumstances under which partnership/LLC interests could be sold.

h. Circumstances under which partners/members could withdraw.

- i. What assets should be used to fund the LP.
- j. How income from the LP will be divided.

...

- 51. Did you read the agreement before signing it?
- 52. Did you follow all of the terms of the LP agreement?
- 53. Who decided which assets were to be contributed to the LP?
- ...
- 93. Were you parents financially dependent on LP distribution?

These remaining questions do not implicate correspondence or other communications between Respondent and Thornton. The attorney-client privilege is inapplicable because that privilege applies to “communications between client and attorney for the purpose of obtaining legal advice.” *Gomez*, 255 F.3d at 1131. Respondent therefore may not decline to answer the remaining questions on that basis.

b. Questions Objected to on the Basis of Having Previously Answered

Petitioners seek to compel Respondent to answer two questions which he declined to answer at the February 2nd interview on the basis that he had already provided answers. The attorney-client privilege attaches to neither question.

Question 84:

Question 84 asks: “Did you follow section 4.1 of the LP agreement in determining how much to distribute in 2001 and who to distribute it to?” The recorded answer is: “Mr. Thornton instructs him not to answer on the basis he already explained it.” Question 82 had asked the identical question about the 2000 distributions. The recorded answer is: “He did not go back and read the LP agreement.” This may be the previous explanation referred to in Thornton’s instruction that Respondent not answer question 84. However, there is no indication that the answer to question 84 is the same as the answer to question 82. Respondent had not already explained the 2001 distributions in any meaningful manner. Respondent therefore may not decline to answer question 84 on this basis.

Question 86:

Question 86 asks: “Did you follow section 4.1 of the LP agreement in determining how much to distribute in 2002 and who to distribute it to?” The recorded answer is: “Mr. Thornton

1 instructs him not to answer on the basis he already explained it.” Respondent may not decline to
 2 answer question 86 on this basis for the same reason that he may not decline to answer question
 3 84 on this basis.

4 3. Billing Statements and Invoices

5 Petitioners seek to compel Respondent to produce billing statements and invoices relating
 6 to the creation of the FLP. The attorney-client privilege does not protect communications such as
 7 fee arrangements that do not convey the substance of confidential professional communications.
 8 *Ousterhoudt*, 722 F.2d at 593-94. The amount of a fee is generally not protected by the attorney-
 9 client privilege. *Clarke*, 974 F.2d at 129. However, “correspondence, bills, ledgers, statements,
 10 and time records which also reveal the motive of the client in seeking representation, litigation
 11 strategy, or the specific nature of the services provided, such as researching particular areas of
 12 law, fall within the [attorney-client] privilege.” *Id.* Respondent therefore must provide
 13 Petitioners with the requested billing records and invoices, but may redact any privileged
 14 information which speaks to the specific nature or substance of the services provided or reveals
 15 client motives or litigation strategy.

16 IV. ORDER

17 Good cause therefore appearing, IT IS HEREBY ORDERED THAT:

- 18 1. The Petition is DENIED with respect to the letter faxed by Thornton to
 19 Respondent on February 23, 2000, and questions 17, 29-31, 41-43, and 45 of the
 20 oral testimony.
- 21 2. The Petition is GRANTED with respect to questions 16, 24-28, 34-40, 44, 48-49,
 22 51-53, 55, 84, 86, and 93 of the oral testimony and the non-privileged portions of
 23 billing statements.
- 24 3. Petitioners’ request for an award of costs is DENIED.

1 DATED: October 30, 2006

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JEREMY FOGEL
United States District Judge

1 This Order has been served upon the following persons:

2 Cynthia Lewis Stier cynthia.stier@usdoj.gov

3 Tim A. Tarter tim@woolston-tarter.com, nancy@woolston-tarter.com